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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ROCHELLE LEE LACY, Defendant and Appellant.	C082357 (Super. Ct. No. CRF160240)

A jury convicted defendant Rochelle Lee Lacy of unlawfully taking or driving a vehicle (Veh. Code, § 10851), receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)),[1] and felony identity theft (§ 530.5, subd. (a)), and in a bifurcated proceeding, sustained a strike allegation (§ 667, subds. (c), (e)(1)). The trial court sentenced defendant to a six-

[1] Undesignated statutory references are to the Penal Code.

year state prison term, consecutive to a one-year term for a subordinate offense from another case.

On appeal, defendant contends she cannot be convicted of both stealing and receiving the same vehicle, her conviction for receiving a stolen vehicle should be reduced to a misdemeanor in light of Proposition 47, the Safe Neighborhood and Schools Act, and her felony sentence for unlawfully taking or driving a vehicle was unauthorized in light of Proposition 47. The Attorney General identifies errors in the abstract. We shall strike the receiving conviction, order corrections to the abstract, and affirm the judgment as modified.

BACKGROUND

On January 10, 2016, Terry C. parked his motor home in a strip mall parking lot. His 2003 Ford pickup truck[2] was parked next to the motor home. He moved the motor home to a camping area each night.

Defendant, an acquaintance of Terry C., came by to visit and use his computer. After Terry C. told her to stop using the computer, defendant left the motor home, and walked to a nearby store. About 20 minutes later, defendant returned to the motor home, retrieved her belongings, and left. Terry C. soon noticed that the keys to his truck were missing. Before leaving for the night, Terry C. let the air out of his truck's right front tire to keep it from being stolen. The truck was gone when Terry C. returned to the parking lot the next morning.

Terry C. reported the truck as stolen; Suisun City Police Officer James Sousa was dispatched to investigate. Terry C. told Officer Sousa that defendant may have stolen the truck. Officer Sousa called defendant, who denied stealing or possessing the truck.

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2 Terry C. bought the truck from his brother for $700 in November 2015.

Asked why Terry C. would accuse her of the theft, defendant replied that she had resisted his sexual advances one day ago.

On January 12, 2016, around 10:30 a.m., Officer Richard Wright was dispatched to investigate a report of a person rummaging through garbage cans left out for pick up. Officer Wright found defendant sitting alone in Terry C.'s truck. Defendant showed Officer Wright a purported bill of sale for the truck from Terry C. that was dated January 12, 2016. Defendant explained that she bought the truck from Terry C. and prepared the document, which Terry C. signed in two places to complete the transaction.

Terry C. denied selling the truck to defendant. He never signed the bill of sale, which had his name misspelled.

DISCUSSION

I

Defendant contends that she cannot be convicted of both stealing and receiving the same truck under these facts. The Attorney General concedes the point. We accept the concession.

Section 496, subdivision (a) provides, in relevant part: "A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." Defendant was convicted of violating section 496d, which specifically refers to vehicles, and does not restate the above language barring dual conviction. Nevertheless, this principle is well settled in case law and applies here.

In *People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*), our Supreme Court reaffirmed that common law prohibits separate convictions of the same person for stealing and receiving the same property. When the violation of Vehicle Code section 10851 and receiving stolen property is based specifically on the act of taking the vehicle, the general prohibition of dual conviction for theft and receiving applies. (*Garza*, at p. 881.)

An exception to this rule exists where there are two distinct violations of Vehicle Code section 10851, one unlawful taking and a separate unlawful driving, then a conviction based on unlawful driving is not a conviction for theft and does not bar a conviction for receiving the same vehicle. (*Garza, supra*, 35 Cal.4th at p. 881.) The facts of this case do not support applying the exception. There is no evidence defendant drove the truck separately from any driving she did to steal it. The trial court did not instruct the jury with the instruction that defendant could not be convicted of receiving and stealing the same vehicle, CALCRIM No. 3515. The prosecutor proceeded on the theory that defendant stole the truck, arguing "defendant took a vehicle without the owner's consent intending to deprive the owner of possession for any period of time," and that the receiving charge was an "alternative" to the Vehicle Code section 10851 charge.

Accordingly, we shall reverse the receiving conviction. Since the trial court imposed a concurrent term for this count, a remand for resentencing is unnecessary.[3]

II

As pertinent to this case, Proposition 47 added section 490.2, which states in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (§ 490.2, subd. (a).) Defendant asserts that Vehicle Code section 10851, unlawfully taking or driving a vehicle, is a theft offense subject to section 490.2.

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[3] Since we are reversing the receiving conviction, it is unnecessary to consider defendant's claim that the felony conviction for receiving should be reduced to a misdemeanor under Proposition 47.

Section 1170.18, subdivision (a) provides: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ."

The Attorney General argues that we are not permitted to grant defendant's requested relief because she must file a section 1170.18 petition for resentencing. Proposition 47 was enacted on November 4, 2014, and went into effect on the following day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Defendant's crime was committed after Proposition 47's effective date. Therefore, the changes wrought by Proposition 47 applied to her case. We address defendant's contention on the merits.

Whether Vehicle Code section 10851 is subject to section 490.2 is a matter currently before the California Supreme Court. (See, e.g., *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; and *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793.) We find that the punishment for unlawfully driving or taking a vehicle was not changed by Proposition 47.

Defendant contends Vehicle Code section 10851 should be subject to the provisions of section 490.2 for thefts of vehicles that do not exceed $950 in value. She claims this interpretation is consistent with the voters' intent in passing Proposition 47, and follows from a commonsense reading of the term "theft" as used in section 490.2. Defendant also notes Proposition 47 itself refers to Vehicle Code section 10851 violations as "auto theft." Since unlawfully taking or driving a vehicle is a lesser included offense of grand theft auto, section 487, subdivision (d) (see *People v. Barrick* (1982) 33 Cal.3d 115, 128), defendant claims exempting Vehicle Code section 10851 from section 490.2 creates an anomalous result not intended by the voters. And, finally,

she argues that equal protection requires thefts of vehicles worth $950 or less to be treated the same as other thefts of similar value.

The initiative reduced to misdemeanors three drug crimes, Health and Safety Code sections 11350, 11357, and 11377, as well as the property crimes of forging or writing bad checks (§§ 473, 476a) and receiving stolen property (§ 496). It also reduced to misdemeanors thefts and certain burglaries of commercial premises that did not exceed $950 through the newly enacted crimes of petty theft (§ 490.2) and shoplifting (§ 495.5), and limited felony punishment for petty theft with a prior (§ 666) for recidivists who would be disqualified from resentencing under the initiative. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Official Title and Summary of Prop. 47, p. 34 (2014 Voter Guide); see also *id.*, text of Prop. 47, §§ 5-13, pp. 71-73.)

Vehicle Code section 10851 is notably absent from the criminal statutes changed by Proposition 47. As previously discussed, the initiative allows for resentencing of those whose crimes would have been misdemeanors had Proposition 47 been in effect at the time of the offense. Since Proposition 47 did not amend Vehicle Code section 10851, defendant's crime would still be subject to felony or misdemeanor punishment had the initiative been in effect at the time of her crime. (See Veh. Code, § 10851, subd. (a).) Therefore, based on the statutory language alone, whether before or after Proposition 47, defendant could be convicted for a felony violation of Vehicle Code section 10851.

Defendant's claim instead centers on an interpretation of section 490.2, specifically the phrase, "[n]otwithstanding Section 487 or any other provision of law defining grand theft."

"In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. [Citation.] We turn first to the statutory language, giving the words their ordinary meaning. [Citation.] If the statutory language is not ambiguous, then the plain meaning of the language governs. [Citation.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and

arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved. [Citations.]" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

The problem with defendant's proposed interpretation of section 490.2 is that Vehicle Code section 10851 does not describe a form of grand theft. The crime of unlawfully driving or taking a vehicle " 'proscribes a wide range of conduct.' [Citation.] A person can violate [Vehicle Code] section 10851[, subdivision] (a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*Garza, supra,* 35 Cal.4th at p. 876.) Since section 490.2 amends only section 487 and any other provision defining grand theft, it is simply inapplicable to Vehicle Code section 10851. For this same reason, it is therefore irrelevant that Vehicle Code section 10851 is a lesser included offense of grand theft auto. Since the crime of unlawfully taking or driving a vehicle proscribes theft and nontheft activity, it is not anomalous to preclude this crime from section 490.2.

The Legislature does not define grand theft by implication. Section 487 is not the only penal statute that specifically defines a form of grand theft. (See, e.g., §§ 487a, subd. (a) [any theft of a "horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow, or pig" is grand theft], 487d ["Every person who feloniously steals, takes, and carries away, or attempts to take, steal, and carry from any mining claim, tunnel, sluice, undercurrent, riffle box, or sulfurate machine, another's gold dust, amalgam, or quicksilver is guilty of grand theft"].) Section 490.2 covers crimes such as these rather than offenses with nontheft components like unlawfully driving or taking a vehicle.

Defendant correctly points out that courts have referred to Vehicle Code section 10851 as auto or vehicle thefts. (See, e.g., *In re D.B.* (2014) 58 Cal.4th 941, 945; *People v. Williams* (2008) 43 Cal.4th 584, 608; *People v. Johnson* (2004) 32 Cal.4th 260, 264.) She additionally notes references in the Penal Code to violations of Vehicle Code section

10851 as "auto theft" (see § 186.2, subd. (a)(32) ["Offenses involving the theft of a motor vehicle, as specified in Section 10851 of the Vehicle code"]) and "theft of a motor vehicle" (see § 666, subd. (a) ["auto theft under section 10851 of the Vehicle Code"]), and in legal treatises (see, e.g., 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Elements, § 36, p. 313 ["Veh.C. 10851 [vehicle theft]"]; 3 Witkin & Epstein, Cal. Criminal Law, *supra*, Punishment, § 471, p. 645 ["statute applies to all felony convictions of vehicle theft under Veh.C. 10851, not merely those where defendant intended permanently to deprive owner of possession"].)

The correct term for the crime established in Vehicle Code section 10851, unlawful driving or taking of a vehicle (see, e.g., *People v. Navarro* (2007) 40 Cal.4th 668, 673, fn. 2; *Garza, supra*, 35 Cal.4th at p. 871), is cumbersome compared to the more succinct "vehicle theft" or "auto theft." If the defendant's conduct in question clearly involved the theft of a vehicle rather than unlawful driving, then the shorter term may be more accurate as well. The use of shorthand references to Vehicle Code section 10851 does not alter the fundamental fact that one can violate this statute without committing a theft.[4]

The statutes cited by defendant do not support finding Vehicle Code section 10851 as no more than a theft statute. Section 186.2 is part of the California Control of Profits of Organized Crime Act (§ 186 et seq.), which provides for the forfeiture of profits obtained via organized crime (§ 186.1; *People v. Madeyski* (2001) 94 Cal.App.4th 659, 663). Section 186.2 states in pertinent part: "(a) 'Criminal profiteering activity' means

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[4] While defendant was convicted of violating Vehicle Code section 10851 under a theft theory, this does not entitle her to relief. Proposition 47 did not amend or mention Vehicle Code section 10851. Defendant is entitled to relief only if Vehicle Code section 10851 defines a form of grand theft so that it is covered by section 490.2. Since it prohibits theft and nontheft conduct, Vehicle Code section 10851 was not implicitly amended by section 490.2, and therefore defendant is not entitled to relief even if she was convicted for stealing a vehicle under Vehicle Code section 10851.

any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections: [¶] . . . [¶] (32) Offenses involving the theft of a motor vehicle, as specified in Section 10851 of the Vehicle Code." This simply limits the recovery of profits from organized crime involving Vehicle Code section 10851 violations to those stemming from vehicle thefts rather than other activity such as unlawfully driving a vehicle. It does not limit the type of criminal conduct covered by Vehicle Code section 10851.

Section 666, petty theft with a prior, states in pertinent part that "any person . . . who, having been convicted of petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison." (§ 666, subd. (a).) The reference to Vehicle Code section 10851 was not changed by Proposition 47 when it amended that statute. (2014 Voter Guide, *supra*, text of Prop. 47, § 10, p. 72.) As with section 186.2, section 666 refers to violations of Vehicle Code section 10851 as auto thefts in order to limit application of section 666 to auto thefts rather than the unlawful taking of a vehicle. This does not diminish the range of criminal activity covered by Vehicle Code section 10851.

Defendant relies on the broad purpose of the initiative, "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and [to] support programs in K-12 schools, victim services, and mental health and drug treatment," (2014 Voter Guide, *supra*, text of Prop. 47, § 2, p. 70) in support of her position. We are not persuaded.

"But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' [Citation.]" (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 [94 L.Ed.2d 533, 538]; accord, *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].) The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute. (*County of Sonoma*, at p. 48.)

The text of Proposition 47 does not support applying it to Vehicle Code section 10851 convictions. Likewise, by its terms, section 490.2 applies to section 487 and other statutes that explicitly define a form of grand theft. Since Vehicle Code section 10851, both by its text and as interpreted, does not define a grand theft offense, section 490.2 does not cover the crime. Therefore, the general purpose of Proposition 47 cannot be invoked to the clear meaning of Proposition 47 generally, and specifically, sections 1170.18 and 490.2. (See *People v. Morales* (2016) 63 Cal.4th 399, 408 ["But the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings"].)

We also reject defendant's equal protection argument. "Neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other,

violates equal protection principles. [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) It has therefore long been the case that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) Unless the defendant can show that he or she " 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation. [Citation.]" (*Wilkinson,* at p. 839.) Defendant has not made this showing, so her claim fails.

For the same reason, it is not an anomaly not intended by the voters to allow a person convicted of Vehicle Code section 10851 involving a vehicle worth $950 or less to receive a greater punishment under that provision than under section 487. The fact that different statutes punish the same conduct differently is not anomalous.

Since Proposition 47 did not change the range of punishment for Vehicle Code section 10851 violations, defendant is not entitled to relief.

III

The Attorney General points out two errors in the abstract.

The trial court sentenced defendant to a three-year upper term for the Vehicle Code section 10851 violation, doubled to six years for the prior strike. It also awarded 185 days of presentence credit, consisting of 161 days of actual credit and 24 days of conduct credit.

The abstract gets the total term correct but does not show that the three-year term was doubled for the strike. It erroneously lists the presentence credits as 161 total days, consisting of 24 days' actual and 185 days' conduct.

We shall order the trial court to correct these errors.

DISPOSITION

The conviction for receiving a stolen vehicle (§ 496d) is reversed. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract reflecting the judgment as modified as well as correcting the errors identified in this opinion. The court is further directed to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

/s/
Blease, Acting P. J.

We concur:

/s/
Hull, J.

/s/
Butz, J.